

STATE OF WISCONSIN

Department of Industry, Labor & Human Relations

*In the Matter of the PECFA Appeal of*

James Scheidegger  
Jim's Mobil Service  
14415 W. Beechwood  
New Berlin WI 53151-4001

PECFA Claim #53151-4001-01  
Hearing #94-11

Final Decision

**PRELIMINARY RECITALS**

Pursuant to a petition for hearing filed November 15, 1993, under § 101.02(6)(e), Wis. Stats., and §ILHR 47.53, Wis. Adm. Code, to review a decision by the Department of Industry, Labor and Human Relations, a hearing was held on January 24, 1995, at Milwaukee, Wisconsin.

The issue for determination is:

Whether the department's decision not to reimburse the appellants for the following item claimed was reasonable: \$15,000.00 representing a 15% markup for subcontractor labor.

There appeared in this matter the following persons:

**PARTIES IN INTEREST:**

James Scheidegger  
Jim's Mobil Service 14415 W. Beechwood  
New Berlin WI 53151-4001  
By: James P. Bumett  
Lutz Bumett McDennott & Jahn 50 East Main Street  
P O Box 146  
Chilton \VI 53014-0146

Department of Industry, Labor and Human Relations  
201 East Washington Avenue  
P.O. Box 7946  
MADISON WI 53707-7946  
By: Kristiane Randal  
Assistant General Counsel  
P.O. Box 7946  
Madison WI 53707-7946

The administrative law judge issued a Proposed Decision dated November 7, 1995, and the parties were provided an opportunity to file objections. The authority to issue a final decision in this matter has been delegated to the undersigned by order of the Secretary dated October 20, 1995.

The matter now being ready for decision, I hereby issue the following

#### FINAL DECISION

The Proposed Decision dated November 7, 1995, is hereby adopted as the final decision of the department.

#### NOTICE TO PARTIES

##### Request for Rehearing

This is a final agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Department of Industry, Labor & Human Relations, Office of Legal Counsel P. O. Box 7946, Madison, WI 53707-7946,

Send a copy of your request for a new hearing to all the other parties named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes

##### Petition For Judicial Review

Petitions for judicial review must be filed no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one). The petition for judicial review must be served on the Department of Industry, Labor and Human Relations, Office of Legal Counsel 201 E. Washington Avenue, Room 400y, P. O. Box 7946, Madison, WI 53707-7946.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" named in ties decision. The process for judicial review is described in Sec. 227.53 of the statutes.

Dated and mailed:

Richard C. Wegner, Deputy Secretary  
Department of Industry, Labor & Human Relations  
P O Box 7946  
Madison WI 53707-7946

cc: Parties in Interest and counsel

STATE OF WISCONSIN

# DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS

IN THE MATTER OF: The claim for  
reimbursement under the PECFA  
Program by

MILWAUKEE HEARING OFFICE  
819 N 6th Street  
Room 382  
Telephone:(414) 227-4416  
Milwaukee, WI 53203  
Fax: (414) 227-4264

James Scheidegger, d/b/a Jim's Mobile Service

Re: PECFA Claim # 53151-4001-01

## PROPOSED HEARING OFFICER DECISION

### NOTICE OF RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above-stated matter. Any Party aggrieved by the Proposed decision must file written objections to the findings of fact and conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Milwaukee Hearing office, 819 North 6th street, Room 382, Milwaukee, WI 53203. After the objection period, the hearing record will be provided to Richard C. Wegner, Deputy Secretary of the Department of Industry, Labor and Human Relations, who is the individual designated to make the FINAL Decision of the Department of Industry, Labor and Human Relations in this matter.

STATE HEARING OFFICER:

WILLIAM D. MCKEOWN

DATED AND MAILED:

November 7, 1995

(originally April 12, 1995)

MAILED TO:

Attorney James P. Burnett  
Lutz, Burnett, McDermott & Jahn  
50 East Main Street  
Chilton, Wisconsin 53014  
(414) 849-9323

Department of Industry, Labor  
and Human Relations  
Attorney Kristiane Randal  
P.O.- Box 7946  
Madison, WI 53707-7946  
(608) 267-4433

On November 15, 1993, the Department of Industry, Labor and Human Relations issued an appealable order denying James Scheidegger, d/b/a Jim's Mobile Service reimbursement in the amount of \$15,878.12 under the PECFA program. James Scheidegger, d/b/a Jim's Mobile Service filed a timely appeal from such denial on December 2, 1993. A hearing pursuant to that appeal was held on January 24, 1995 at Milwaukee, Wisconsin, before Administrative Law Judge William D. McKeown, acting as A State Hearing officer.

Based on the applicable records and evidence in this case, the state hearing officer makes the following

#### PROPOSED FINDINGS OF FACT

1. At all times material, James Scheidegger, d/b/a Jim's Mobile Service (hereinafter the applicant) was the legal owner of the premises located at 12401 West Cleveland- Avenue, New Berlin, Wisconsin where a petroleum distribution business was operated.
2. On or about March 31, 1993, the applicant filed a claim for reimbursement of expenses associated with site cleanup at the premises identified in paragraph 1 in the total amount of \$570,739.80. The Department of Industry, Labor and Human Relations (hereinafter the department) made reimbursement thereafter to the applicant in the amount of \$552,722.15.
3. The applicant appealed denial of reimbursement for a 15% markup for subcontractor labor in the amount of \$15,000.00.
4. On May 19, 1992, a meeting was held at the request of the applicant. Beside the applicant, representatives of two environmental contractors, the applicant's financing source, and the department attended. The main purpose for the meeting was to obtain consensus as to the means proposed by the environmental contractor for soil remediation at the site. The applicant was advised during the meeting that only one of the two environmental contractors present would qualify for any "mark-ups" for overhead or administrative services in performing remediation work at the site. one environmental contractor, ENPRO PLUS, was then designated as the contractor to execute the remediation action.
- S. After the landfill method of remediation was approved, ENPRO PLUS solicited bids from landfill sites and from hauling companies to remove and dispose of the contaminated soil. In the course of such bid process, ENPRO PLUS identified a landfill site which offered to discount the fees otherwise chargeable by 5% in the event a lump sum payment in the amount of \$100,000 was deposited on account. The financial institution which had agreed to finance the remediation project for the applicant then tendered such payment directly to the landfill site, without billing or contact with ENPRO PLUS. The \$15,000.00 later claimed as reimbursement by the applicant for monies paid to ENPRO PLUS as subcontractor markup for this activity is the amount in dispute.
6. The applicant contended that equity supported reimbursement of the \$15,000.00 on the grounds that it avoided any "pass through" of the costs normally associated with subcontractor markup transactions only in an attempt to reduce by 5% the amount of costs reimbursed by the fund for remediation work, and that the department had, at least tacitly concurred with the means by which the \$100,000.00 in question was transmitted, thereby approving the transaction for subcontractor markup later. While the appeal tribunal does not dispute the logic or accuracy of the arguments raised, to sustain the applicant's position would require redefinition of the purpose of the subcontractor markup. The subcontractor markup, limited to 15% of the amount billed, is designed to reimburse a contractor for out of pocket expenses, such as its own bank interest on lines of credit, administrative costs such as clerical fees for invoicing and record-keeping, and the like. Implied is that there be actual costs incurred in the transaction to justify the payment of fund dollars. Herein, the payment was made directly from the bank to the landfill site; ENPRO PLUS was not involved, and did not incur any costs. No basis therefore exists for reimbursement of such nonexistent costs to the applicant for markup not earned.

#### PROPOSED CONCLUSIONS OF LAW

1. The applicant is the owner of a property covered by the remedial provisions of section 101.143 of the Wisconsin statutes.
2. The sum of \$15,000.00 for subcontractor markup costs was properly deleted -from the amount reimbursed to the applicant, within the meaning of section 101.143(c)(4) of the Wisconsin Statutes, and chapter ILHR 47.30(2) (h) of the Wisconsin Administrative Code;

#### PROPOSED DECISION

The department's decision denying reimbursement to the applicant is affirmed. Accordingly, the applicant is denied additional reimbursement in the amount of \$15,000.00, together with applicable loan interest charges.

WILLIAM D. MCKEOWN,  
State Hearing officer